

Message Text

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PAGE 01 STATE 205391

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TO AMEMBASSY NEW DELHI PRIORITY

INFO USMISSION USUN NEW YORK

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E.O. 11652: N/A

TAGS: EGEN, UNCTAD

SUBJECT: CHARTER OF ECONOMIC RIGHTS AND DUTIES

REF: NEW DELHI 12060

1. EMBASSY'S ENERGETIC REPRESENTATIONS TO GOI GREATLY APPRECIATED. WE ARE PLEASED TO KNOW GOI IS REVIEWING ITS POSITION BEFORE RESUMPTION OF CONSULTATIONS IN NEW YORK OCT 8.

2. INDIA CONTINUED IN GENEVA TO CONSTITUTE A PRINCIPAL BARRIER TO ACCEPTANCE OF PROVISION THAT "EACH STATE HAS

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PAGE 02 STATE 205391

THE RIGHT TO NATIONALIZE...FOREIGN PROPERTY, PROVIDED

THAT JUST COMPENSATION SHALL BE PAID IN THE LIGHT OF ALL RELEVANT CIRCUMSTANCES." IT ALSO CONTINUED TO RESIST A PROVISION THAT, IN RESPECT OF RIGHTS CONCERNING FOREIGN INVESTMENT, STATES SHALL RESPECT THEIR "INTERNATIONAL OBLIGATIONS". HOWEVER, INDIA AT LAST STAGE OF GENEVA CONSULTATIONS DID MANIFEST SOME WILLINGNESS TO DESIST FROM INSISTING ON AN EXPRESS REFERENCE TO DOMESTIC LAW AS GOVERNING NATIONALIZATION AND COMPENSATION THEREFOR, AND THAT IS HELPFUL. INDIA CONDITIONED ITS MORE FLEXIBLE ATTITUDE IN THIS LATTER REGARD, HOWEVER, ON INCLUSION OF A PROVISION THAT NO STATE SHALL DEMAND PRIVILEGED TREATMENT FOR ITS INVESTORS ABROAD. USDEL INFORMED CHADHA THAT SUCH A PROVISION IS UNACCEPTABLE AND THAT THOUSANDS OF INTERNATIONAL ARBITRAL AWARDS AND

A LARGE BODY OF INTERNATIONAL LAW ARE TO THE CONTRARY. EL ERIAN (EGYPT) SUPPORTED USDEL BUT CHADHA WAS UNYIELDING.

3. IN ANY FURTHER CONVERSATIONS WITH INDIAN OFFICIALS, YOU MAY WISH TO REITERATE THAT AGREEMENT ON FOREIGN INVESTMENT PROVISIONS IS KEY TO AGREEMENT ON THE CHARTER AS A WHOLE, AND THAT THE REQUESTED INDIAN CONCESSIONS WILL NOT BE PREJUDICIAL TO INDIAN INTERESTS. TO PROVIDE FOR PAYMENT OF "JUST COMPENSATION IN THE LIGHT OF ALL RELEVANT CIRCUMSTANCES" IS SURELY A POSITION FLEXIBLE ENOUGH TO MEET ANY INDIAN NEEDS THAT MAY BE PRACTICALLY FORESEEN. TO REFER TO "INTERNATIONAL OBLIGATIONS" PERMITS GOI TO ARGUE THAT ONLY INTERNATIONAL OBLIGATIONS FREELY UNDERTAKEN, AS BY TREATY, RATHER THAN ALSO THOSE OBTAINING UNDER CUSTOMARY INTERNATIONAL LAW, IS MEANT (EVEN THOUGH GROUP B WILL ARGUE THAT "INTERNATIONAL OBLIGATIONS" DOES EMBRACE CUSTOMARY INTERNATIONAL LAW AS WELL AS TREATIES). AS FOR ISSUE OF PRIVILEGED TREATMENT OF FOREIGN INVESTORS, WHOLE LAW OF STATE RESPONSIBILITY IN RESPECT OF THE MINIMUM STANDARD GOVERNING A STATE'S TREATMENT OF THE PERSONS AND PROPERTY OF FOREIGNERS RESTS ON THE POSITION THAT A FOREIGN STATE MAY REQUIRE THAT ITS NATIONALS BE TREATED IN A WAY BETTER THAN THAT WHICH LIMITED OFFICIAL USE

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PAGE 03 STATE 205391

THE HOST STATE AFFORDS ITS NATIONALS. INDIA CAN HARDLY EXPECT THAT USG AND OTHER STATES WHICH HAVE MADE THOUSANDS OF DIPLOMATIC CLAIMS AND LITIGATED THOUSANDS OF ARBITRATIONS ON BASIS OF THIS PROPOSITION WILL NOW RELINQUISH IT IN THIS CHARTER. FOR INDIA TO CONDITION ANY CONCESSIONS ON THIS REQUIREMENT IS TO POSE A CONDITION WHICH IT SHOULD KNOW THAT USG CANNOT MEET. INGERSOLL

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